

A Quick Guide to Open Meetings and Public Records in Tennessee

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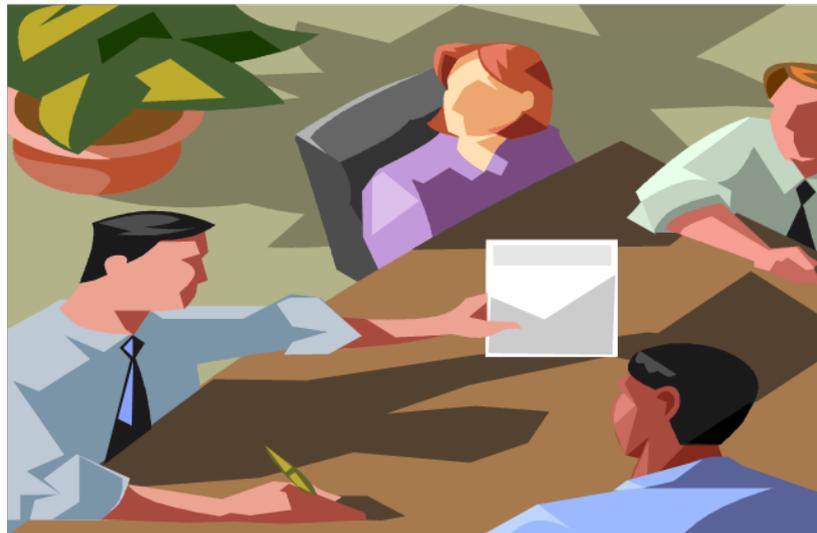
A Presentation to the East Tennessee Division of TACEO

June 6, 2011



Tennessee Open Meetings Act

- Tennessee Open Meetings Act, 1974
(T.C.A. § 8-44-101 et seq.)



Open Meetings or the Sunshine Law

- ◆ T.C.A. § 8-44-101(a): The general assembly hereby declares it to be the policy for this state that the formation of public policy and decisions is public business and shall not be conducted in secret.
 - The Act is to be construed most favorably to the public and applies to every meeting of a governing body except where statutory exclusion exists.
 - The Act does not guarantee citizens the right to participate in meetings but rather to attend and observe.

See Souder v. Health Partners, Inc., 997 S.W.2d 140 (Tenn. Ct. App. 1998)

Open Meetings or the Sunshine Law (cont.)

- ◆ T.C.A. § 8-44-102(a): All **meetings** of any **governing body** are declared to be public meetings open to the public at all times, except as provided by the constitution of Tennessee.
[emphasis added]

Open Meetings or the Sunshine Law (cont.)

T.C.A. § 8-44-102 (b) :

- (1)(A) “Governing body” means: The members of any public body which consists of two (2) or more members, with the authority to make decisions for or recommendations to a public body on policy or administration . . .
- (2) “Meeting” means the convening of a governing body of a public body for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter. “Meeting” does not include any on-site inspection of any project or program.

Tenn. Code Ann. Section 2-1-113

- ◆ (a)(1) Boards and commissions established under this title shall meet on the call of their chair, or if there is no chair, of the oldest member of the body in age.
- ◆ (2) All meetings shall be open and subject to the provisions of title 8, chapter 44.
- ◆ (3) With respect to meetings regularly scheduled by county election commissions or county primary boards, the public notice requirement of this section may be met by permanently posting in the commission office a conspicuous meeting notice. All notices shall state the time, place and purpose for which the meeting is called.
- ◆ (4) Official minutes of all meetings shall be kept in permanent form and shall include the vote of each member on all issues passed upon. Minutes shall be available to the public for examination at reasonable times.
- ◆ (b) A majority of the members shall constitute a quorum for any board or commission established under this title. Action shall be taken by vote of the majority of the members of the board or commission present. Any action taken at a meeting which does not meet the requirements of this section is voidable at the request of any person who is adversely affected by the action.

Public Body: Examples

T.C.A. § 8-44-102 (b) “public body” includes:

- County commission
- City council
- School Board
- County Election Commissions
- Board of commissioners of a utility district
- Any other County or Municipal Board or Commission

Compliance

- ◆ Establish a compliant meeting process
 - Meeting dates: review for governmental and religious holidays
 - Meeting preparation: time needed for preparation and distribution of materials for consideration at meeting
 - Agendas: clearly identify issues on which actions need to be taken
 - Record keeping: promptly prepare minutes, circulate timely for review

Compliance (cont.)

- ◆ Bylaws or rules of procedure aid in the orderly conduct of business in a meeting in compliance with the Act.
 - Regular scheduled meeting date, time and location
 - Special called meeting: authority to call and notice timeframe
 - Assignment of responsibility for records (preparation and retention)
 - Quorum (required number of voting members who must be present in order for business to be legally transacted at meeting)(not reference to the number who must vote)
 - Proxy/designee/ex officio
 - Agenda and order of actions

Chance Meetings

◆ Chance meeting: T.C.A. § 8-44-102(c)

Nothing in this section shall be construed as to require a chance meeting of two (2) or more members of a public body to be considered a public meeting. No such chance meetings, informal assemblages, or electronic communication shall be used to decide or deliberate public business in circumvention of the spirit or requirements of this part.

"Adequate Public Notice"

- ◆ Adequate Public Notice: T.C.A. § 8-44-103
 - Regular meeting: previously scheduled by statute, ordinance or resolution (also by bylaws)
 - Special meeting: not pursuant to previous scheduling but adequate notice still required
 - Section supplemental to other provisions of law requiring notice

“Adequate Public Notice” (cont.)

- ◆ Adequate Public Notice: T.C.A. § 8-44-103
judged on facts and circumstances, not single formula
 - Notice timing: notice is deemed sufficient if “interested citizens” are given reasonable opportunity to exercise right to be present at meeting.
 - ◆ Remember- the “right” is to be present, not to participate.
 - Notice content: notice must reasonably described proposed action.

Special Called Meetings and “Adequate Public Notice”

- ◆ Tennessee Court of Appeals for the Eastern Section outlined the following three-prong test for “adequate public notice” for a special called meeting. *Englewood Citizens for Alternate B v. Town of Englewood*, No. 03A01-9803-CH-00098, slip op. (E.S.Tenn.Ct.App. June 24, 1999).
 - notice must be posted in a location where a member of the community could become aware of such notice;
 - contents of the notice must reasonably describe the purpose of the meeting or the action proposed to be taken; and
 - notice must be posted at a time sufficiently in advance of the actual meeting in order to give citizens both an opportunity to become aware of and to attend the meeting.

Compliance

- ◆ Notice posting: “location” where interested persons can become aware of meeting
 - Publication: Newspaper vs. internet;
Op. TN. Atty. Gen. 00-09
 - Physical posting: entity office vs. general public location
- ◆ Meeting Location
 - Physical layout: Space sufficiency and acoustics for both members and interested citizens
 - Access:
 - ◆ Procedures for entry to building, signage

Compliance (cont.)

- ◆ **ADA accommodations:** large print or Braille, sign language interpreter, availability of parking near meeting location
- ◆ **Meeting Notice**
 - **If any accommodations are needed for individuals with disabilities who wish to be present at the meeting, please contact** (individual's name) **at** (telephone number and TTY)(by writing to X at Y). **Requests should be made as soon as possible but at least** (time frame) **prior to the scheduled meeting in order for the entity to provide such needed aid or service.**

Tennessee Courts on Executive Sessions

If experience should prove that the public interest is adversely affected by open meetings involving pending or prospective litigation, disciplinary hearings, promotion and demotion decisions, prospective land purchases, labor negotiations, etc., it is the Legislature, not the Judiciary, that must balance the benefits and detriments and make such changes as will serve the people and express their will.

*Lakeway Publishers, Inc. v. The Civil Service Board for the City of Morristown, 1994 WL 315919 at * 3 (Tenn. Ct. App.) (July 5, 1994).*



Attorney-Client Privilege and Executive Session

- ◆ Executive or closed sessions
 - Attorney-client privilege
 - ◆ Common law principle that communication between attorney and client should be free, without concern of disclosure.
 - ◆ Op. TN. Atty. Gen. 80-16 states that the TN Supreme Court in *Dorrier v. Dark*, 537 S.W.2d 888(1976) made “clear that actual decisions on matters of litigation (made after receiving the advice of counsel) are subject to the requirement that meetings be open. Only advisory sessions with attorneys would be exempted through operation of the privilege.”

Meeting Minutes and Records

- ◆ T.C.A. § 8-44-104(a) states:
 - Minutes shall be:
 - ◆ promptly and fully recorded
 - ◆ open to public inspection
 - Minutes shall include:
 - ◆ record of persons present
 - ◆ all motions, proposals, and resolutions offered and results of votes taken

Public vs. Secret Voting

- ◆ T.C.A. § 8-44-104(b) states:
 - All votes must be public (whether vote or ballot) and not secret
 - ◆ Statute specifies that “public vote” means vocal expression of either aye or nay, in that order
 - If roll call votes are taken, the vote must be recorded indicating individual votes

Electronic Participation

- ◆ **Electronic Participation: T.C.A. § 8-44-108**
 - Limited to boards, agencies and commissions of state government and “municipal governing bodies organized under title 6, chapter 18, and having a city commission of three (3) members, and having a population of more than two thousand five hundred (2,500), according to the 2000 federal census or any subsequent federal census”.
 - ◆ Op. TN. Atty. Gen. 99-15: county school board member not allowed to participate by telephone.



What Happens When a Violation Occurs?

- ◆ Remedial nature: T.C.A. § 8-44-105
 - If a meeting is held in violation of the Act, any action taken is void and of no effect; nullification of action rather than penal remedy.
 - Commitments affecting public debt that are otherwise legal are not nullified or voided.
 - Open Meetings Act does not make a distinction between technical and substantive violations of its provisions. *Zselvay v. Metropolitan Government of Nashville and Davidson County*, 986 S. W.2d 581 (Tenn. Ct. App. 1998).

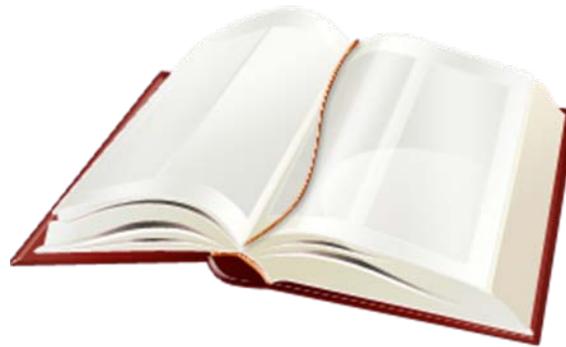
What Happens When a Violation Occurs? (cont.)

Enforcement: T.C.A. § 8-44-106

- Circuit, chancery and other equity courts.
- Court's written findings of fact and conclusions of law and final judgment are to be filed with minutes of governing body.
- Court "shall permanently enjoin any person adjudged by it in violation of this part from further violation of this part. Each separate occurrence of such meetings not held in accordance with this part constitutes a separate violation."
- Jurisdiction retained for one (1) year from entry of judgment; written reports due semiannually from defendants.

Tennessee Public Records Act

- Tennessee Public Records Act, 1957
(T.C.A. § 10-7-501 et seq.)



Tennessee Public Records Act (TPRA)

- ◆ T.C.A. § 10-7-503(a)(2)(A) (*effective July 1, 2008*):
All state, county and municipal records shall at all times, during business hours, which for public hospitals shall be during the business hours of their administrative offices, be open for **personal inspection** by any **citizen** of Tennessee, and those in charge of such records shall not refuse such right of inspection to any citizen, unless otherwise provided by **state law**.
- ◆ In Tenn. Code Ann. Section 10-7-505(d), the General Assembly directs the courts to interpret the provisions of the TPRA “broadly...so as to give the fullest possible public access to public records.”
- ◆ Tennessee Courts have found that even in the face of serious countervailing considerations, unless there is an express exemption within the law, a record and/or information must be released.

Public Record Defined in the TPRA

- ◆ “Public record or records’ or ‘state record or records’ means all documents, papers, letters, maps, books, photographs, microfilms, electronic data processing files and output, films, sound recordings, or other material, regardless of physical form or characteristics made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency.”

T.C.A. § 10-7-503(a)(1)

Whose Records are Accessible under the TPRA?

- ◆ According to Tenn. Code Ann. § 10-7-503 (a)(1) the records of any government agency, whether at the state, county or municipal level, that were “made or received pursuant to law or ordinance or in connection with the transaction of business” are open for public inspection.
- ◆ “Government agency” is defined as any department, division, board, bureau, commission, or other separate unit of government created by law or pursuant to law.

What Records are Accessible under the TPRA?

1. personnel records/applications, resumes, and references
2. contracts*
4. emails and phone messages
5. financial or performance audits
6. annual reports*
7. meeting agendas/minutes*
8. permanent registration records
9. customer lists
10. budgets*
11. voter registration lists for certain purposes

* These records are public whether in a draft form or a finalized version.

“Unless otherwise provided by state law”

- ◆ Tenn. Code Ann. Section 10-7-504 provides a list of records and/or information that are not open for public inspection; however this list is not exhaustive.

- ◆ App. 350 exceptions to the TPRA are found in the following :
 - Tennessee Code Annotated (Statute)
 - Tennessee Rules of Civil and Criminal Procedure
 - Administrative Law Rules
 - Supreme Court Rules
 - Common Law
 - Federal Law

Exceptions to the TPRA

Examples of Exceptions to the TPRA:

1. Social Security numbers on permanent registration records. (Tenn. Code Ann. Section 2-2-127).
2. The identifying information compiled and maintained by any governmental entity concerning a person who has obtained a valid order of protection document may be confidential if certain steps are followed. (T.C.A. § 10-7-504(a)(16)(B)).

Exceptions (cont.)

3. The credit card number of persons doing business with the state or political subdivision thereof and any related personal information identification numbers (PIN) or authorization codes. (T.C.A. § 10-7-504(a)(19)).
4. Records of any employee's identity, diagnosis, treatment, or referral for treatment that are maintained by any state or local government employee assistance program. (T.C.A. § 10-7-504(d)).

Exceptions (cont.)

5. The following records or information of any state, county, municipal or other public employee or former employee, or of any records of any governmental employee that are in the possession of a governmental entity or any person in its capacity as an employer that contain *home and cell phone numbers; residential information (including street address, city, state and zip code) for state employees and residential street address for county, municipal and other employees; bank account and individual health savings account, retirement account, and pension account information; social security number; driver license information except where driving or operating a vehicle is part of the employee's job description or job duties or incidental to the performance of the employee's job; and the same information of immediate family members or household members.* (T.C.A. § 10-7- 504(f)(1)).

Who Can Access Government Records under the TPRA?

- ◆ Tenn. Code Ann. § 10-7-503(a)(2)(A) grants access to public records to “any citizen of Tennessee.”
- ◆ The Tennessee Attorney General has opined that this provision is constitutional, despite the fact that at least one other state with a similar statutory provision has found the provision to be unconstitutional. See Att’y Gen. Ops. 99-067 (March 18, 1999) and 01-132 (August 22, 2001) *but see Lee v. Miner*, 458 F. 3d 194 (Del. 2006).
- ◆ A records custodian has the right to deny a request inspect and/or copy public records from a non-citizen. The denial is not required, it is discretionary.
- ◆ In Tennessee, citizen does include a convicted felon. *Campbell*, 968 S.W. 2d 274 (Tenn. 1998).

When and Where can Public Records be Accessed?

- ◆ A citizen has the right to request both inspection and copies of public records during normal business hours.
- ◆ Tenn. Code Ann. Section 10-7-503(a)(6) prohibits a governmental entity from avoiding its disclosure obligations by contractually delegating its responsibility to a private entity.
 - If the requestor desires to inspect public records, the inspection should take place in the office of the custodian, unless there is a legitimate reason as to why inspection cannot take place in the custodian's office.
 - The requestor should also be able to retrieve the requested records from the record custodian's office. However, the requestor is not required to retrieve the records from the custodian's office. The requestor has the ability to request that the records be mailed and upon payment for postage, the custodian is required to mail the records to the requestor.

Response to a Public Records Request

- Tenn. Code Ann. Section 10-7-503(a)(2)(B) requires a records custodian or the custodian's designee to *promptly* make requested records available for inspection. If the records cannot be made promptly available, within seven (7) business days, the custodian must do one or more of the following:
 - ◆ Provide access to the record;
 - ◆ Deny in writing access to the record with legal basis for denial; or
 - ◆ Indicate in writing additional time necessary to produce the record.

- A custodian's failure to respond to a request in one of the above-mentioned ways within seven (7) business days, constitutes a denial and is actionable under Tenn. Code Ann. Section 10-7-505.

Response to a Public Records Request (cont.)

- A custodian may not require a written request to view a public record, but can require a request for copies to be in writing.
- A records custodian may not assess a charge to view a public record.
- A custodian may require a requestor to produce photo identification with an address in order to inspect or receive copies of records.
- A request for copies “shall be sufficiently detailed to enable the custodian to identify the specific records” requested.
- The custodian shall provide the requestor an estimate of the reasonable cost for producing the requested records.

Response to a Public Records Request (cont.)

- A records custodian is not required to create a document that does not already exist in order to fulfill a public records request.
- A records custodian is not required to compile information or conduct searches for documents.
- A records custodian may require an appointment to view a public record when there is a reasonable basis for requiring the appointment. Absent a reasonable basis, a court would likely view requiring an appointment to be tantamount to a denial or delay in access.

Records Retention and Disposition

- ◆ In *State v. Cawood*, 134 S.W. 3d 159 (Tenn. 2004), the defendant was convicted of various criminal acts during a bench trial. Audiotapes and videotapes were entered as exhibits during the trial. The defendant appealed the convictions and the convictions were overturned. Thereafter, the defendant filed a motion for removal of videotapes and audiotapes from the record and for all the tapes to be placed in his possession permanently. The Court held that the audiotapes and videotapes were “public record” and given that removal of the tapes from the Clerk’s custody was neither authorized nor contemplated as evidenced by the pertinent records disposition authorization that required the Clerk to maintain the records while a case was active and thereafter for the state Records Center to maintain the records for an additional fifty (50) years.
- ◆ Tenn. Code Ann. Section 10-7-404 requires the County Technical Assistance Service to compile and print a records retention manual for counties.
- ◆ Tenn. Code Ann. Section 10-7-702 requires the Municipal Technical Advisory Service to compile and print a records retention manual for municipalities.

Are Public Records Accessible during Litigation?

- ◆ While a party to a lawsuit is clearly not entitled to access the records of an opposing private litigant during the course of litigation outside of the discovery process, the same is not true for an opposing litigant who is a governmental entity.
- ◆ In *Konvalinka v. Chattanooga-Hamilton County Hospital Authority*, 2008 WL 375759 at *10 (Tenn. Feb. 13, 2008), the Supreme Court said the following:

It may very well be that the General Assembly neither intended nor anticipated that the public records statutes they enacted would be used by persons litigating with government entities to obtain records that might not be as readily available through the rules of discovery. However, at present, neither the discovery rules nor the public records statutes expressly limit or prevent persons who are in litigation with a government entity or who are considering litigation with a government entity from filing petitions under Tenn. Code Ann. § 10-7-505(a) seeking access to public records relevant to the litigation.

The Format Issue

- ◆ In *Tennessean v. Electric Power Board of Nashville*, 979 S.W. 2d 297, 304 (Tenn. 1998), the editor of *The Tennessean* requested from NES, the names, addresses, and phone numbers of all NES customers. Because NES did not maintain such a compilation of information, the request was denied. A petition for access was filed and ultimately the case was appealed to the Tennessee Supreme Court. The Court said the following with regard to the information sought:

once information is entered into a computer, a distinction between information and record becomes to a large degree impractical. In our view, it makes little sense to implement computer systems that are faster and have massive capacity for storage, yet limit access to and dissemination of the material by emphasizing the physical format of a record.

The Format Issue (cont.)

- ◆ In *Wells v. Wharton*, 2005 WL 3309651 (Tenn. Ct. App. Dec. 7, 2005), the requestor had developed a computer program that downloaded public records in bulk from the Shelby County Portal website. Eventually, Shelby County shut down the portal because it was overloaded. After several weeks the website reopened, but with restrictions on the amount of information that could be downloaded. The requestor then went into the various offices where the records were kept in order to download the information in bulk, but was unable to do so because the office computers were either unable to handle such requests or the offices did not have public access computers. The requestor then filed a petition for access and the court held:

[i]n Tennessee, the purpose of the Public Records is to allow maximum access to the information contained within public records [and] in light of the purpose of the Tennessee Public Records Act, we conclude that the Tennessee Public Records Act does not require a custodian of records to provide public records in the manner a citizen requests. *Id.* at *9.

According to the Court, ““allowing a custodian of records to choose the manner in which he or she presents public records to citizens is not unreasonable so long as that manner does not distort the record or inhibit access to that record.” *Id.*

Petitioning for Access to Public Records

- ◆ Tenn. Code Ann. Section 10-7-505 addresses the ability of a citizen to petition the court once a request has been denied. The petition is to be filed in either chancery court, circuit court, or any other court in the county having equity jurisdiction.
 - ◆ For state level records, the petition is to be filed in either chancery or circuit court of Davidson County.
 - ◆ For local government records, the petition is to be filed in either chancery or circuit court in the county where the records are located.
- ◆ If a request is denied and a petition is filed, the records custodian must prove by a preponderance of the evidence that there is a provision within state law that authorizes the nondisclosure of the requested record(s).
- ◆ Upon ruling on the petition the court must issue findings of fact and conclusions of law and have the power to exercise full injunctive remedies and relief so as to carry out the purpose and intent of the TRPA.

Petitioning for Access to Public Records (cont.)

- ◆ If the court finds in favor of the requestor, the records are to be made available to the requestor unless a notice of appeal is filed or the court finds that there is a substantial legal issue that exists that should be decided by an appellate court.
- ◆ If the court finds that the governmental entity willfully* refused to provide the records, then the court has the discretion to assess the entity the requestor's attorney's fees as well as all reasonable fees related to the production of the records.
- ◆ In determining whether the entity's action in denying the records was willful, the court will look at any guidance given to the entity by the Office of Open Records Counsel (OORC).

* Willful is not the equivalent of negligence or bad judgment, but rather bad faith

Forms Developed by the OORC

<http://www.tn.gov/comptroller/openrecords/forms.htm>

- ◆ Inspection/Duplication Of Records Request
- ◆ Records Request Denial Letter
- ◆ Records Production Letter
- ◆ Notice of Aggregation Form

Schedule, Policies, and Guidelines Developed by the OORC

<http://www.tn.gov/comptroller/openrecords/forms.htm>

- ◆ Schedule of Reasonable Charges
- ◆ Policy for Frequent and Multiple Requests for Copies of Public Records
- ◆ Safe Harbor Policy
- ◆ Best Practice Guidelines

OORC Contact Information

For questions regarding open meetings laws or open records issues, contact Elisha Hodge at:

615-401-7891 or 1-866-831-3750

Email open.records@tn.gov

Website <http://tn.gov.comptroller/openrecords>

2-2-138. Voter registration lists — Purchase by citizens.

- (a) In counties of this state having a population in excess of one hundred eighty thousand (180,000) according to the United States census of 1970 or any subsequent United States census, or in any computerized county, it is the duty of the county election commission to prepare or cause to be prepared each month a listing, by voting precinct, of all persons registered to vote in each precinct during the preceding month. However, in the discretion of the commissioners of the county election commission, such listing may be prepared on a bimonthly basis.
- (b) Such list, and any other voter registration information such as voter history, if compiled, shall be available for purchase for a price not to exceed the cost of production. This list shall be available to any person who certifies on a form provided by the state election commission that such list will be used for political purposes. The state election commission shall establish a uniform cost for this information. Any county election commission whose cost of production exceeds this rate may petition the state election commission and be granted an increase upon establishing its actual cost to the satisfaction of the state election commission. If the information is provided on computer generated media such as disk, diskette, tape, telecommunications or any other form of magnetic media, then the information shall be provided in non-proprietary and non-encrypted form. Minimum data standards shall be EBCDIC (Extended Binary Coded Decimal Interchange Code), ASCII (American Standard Code Information Interchange) or BCD (Binary Coded Decimal).
- (c) The county election commission in counties with a population over two hundred fifty thousand (250,000) according to the 1980 census shall make voter registration lists available for purchase by any interested citizen, upon request and payment of the cost, at a price not in excess of the cost to prepare and publish such lists. The county election commission in counties with a population over two hundred fifty thousand (250,000) according to the 1980 census shall act upon such request within seven (7) days of receipt of the request, and reasons for rejection or modification of such request, if any, shall be set out in writing.
- (d) (1) Any computerized county, as defined in § 2-1-104(a), shall make the list required by this section available on computer diskette to any person who certifies on a form provided by the state election commission that such list will be used for political purposes.
- (2) A false certification made pursuant to the provisions of this subsection (d) is a Class B misdemeanor, punishable only by a fine of five hundred dollars (\$500).
- (e) Any list of registered voters compiled by the coordinator of elections shall be sold at a price established by the secretary of state. Any money received by the secretary of state from the sale of such lists shall be deposited in the "voting machine loan fund" established in § 2-9-114. This list shall be available for purchase to any person who certifies on a form provided by the state election commission that such list will be used for political purposes only.

Acts 1972, ch. 675, § 1; T.C.A., § 2-238; Acts 1981, ch. 478, § 7; 1993, ch. 379, § 2; 1994, ch. 919, § 32; 1995, ch. 196, § 1; 2000, ch. 756, § 3; 2002, ch. 694, § 1; 2008, ch. 928, § 6.



State of Tennessee
Department of State
Division of Elections
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Nashville, Tennessee 37243
Phone: (615) 741-7956 Fax: (615) 741-1278

Basic Price List for Names of Registered Voters

Computer Printouts

Three (3) cents per name for a straight name list

Five (5) cents per name plus the cost of the labels

Computer Diskettes

Minimum set up fee of \$35.00
Maximum set up fee of \$75.00

The prices herein reflect the uniform pricing system established by the Tennessee State Election Commission on 4/27/2010 for the sale of voter registration list of county voters. No county election commission may charge more without formally requesting an increase before the State Election Commission.